Supreme Court, U.S.
FILED

95-351 AUG 29 1995

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No.

In The

Supreme Court of the United States

October Term, 1995

KNOX COUNTY BOARD OF EDUCATION,

Petitioner,

vs.

RAYMOND RYNES, by his parent and next friend, DEBORAH RYNES and DEBORAH RYNES, Individually,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred when it affirmed the judgment of the District Court for the Eastern District of Tennessee, which found Plaintiffs had prevailed and which reasoned that a "prevailing party" within the meaning of 20 U.S.C. § 1415(e)(4)(B) of the Individuals with Disabilities Education Act should be determined using the but-for test for awarding attorney's fees pursuant to 42 U.S.C. § 1988 from *Johnston v. Jago*, 691 F.2d 283 (6th Cir. 1982).

LIST OF PARTIES

A. PLAINTIFF RAYMOND RYNES, by his parent and next friend, DEBORAH RYNES and DEBORAH RYNES, Individually. Raymond Rynes is a minor who at the time of these proceedings fell within the jurisdiction of the Knox County School System.

B. DEFENDANT KNOX COUNTY BOARD OF EDUCATION. The Knox County School System is the local education agency which at the time of these proceedings was responsible for the education of Plaintiff Raymond Rynes.

Contents

Page

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 24

TABLE OF AUTHORITIES

Cases Cited:

Borengasser v. Arkansas State Bd. of Educ., 996 F.2d 196, 199-200 (8th Cir. 1993) 12

Brown v. Griggsville Community Unit School Dist. No. 4, 12 F.3d 681 (7th Cir. 1993) 12, 13, 15-17, 19

Contents

Page

Combs v. School Bd. of Rockingham County,
15 F.3d 357, 360-61, 363-64 (4th Cir. 1994) 12

Farrar v. Hobby, 506 U.S. ____, 113 S. Ct. 566, 121
L. Ed. 2d 494 (1992) 12, 13, 17, 20-23

Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933,
1939, 76 L. Ed. 2d 40 (1983) 20

Hewitt v. Helms, 482 U.S. 755, 760, 107 S.Ct. 3099,
1486, 96 L.Ed.2d 654 (1987) 22, 23

Johnston v. Jago, 691 F.2d 283
(6th Cir. 1982) . . . . . i, 10-12, 21, 22

Joiner v. District of Columbia, 16 Educ. Handcpt.
L. Rep. (LRP) 424 (D.D.C. 1990) 13, 21, 22

Krichinsky v. Knox County Schools, 963 F.2d 847, 850
(6th Cir. 1992) 12, 20

Maher v. Gagne, 448 U.S. 122, 129, 100 S. Ct. 2570,
65 L. Ed. 2d 653 (1980) 22

Mitten v. Muscogee County School Dist., 877 F.2d 932
(11th Cir. 1989) 12

Parents of Student W. v. Puyallup School Dist. No. 3,
31 F.3d 1489, 1498 (9th Cir. 1994) 12

Phelan v. Bell, 8 F.3d 369, 375 (6th Cir. 1993) 12

Contents

Page

Rhodes v. Stewart, 488 U.S. 1, 4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) 22

S-1 v. State Bd. of Educ. of North Carolina, 21 F.3d 49, 51 (4th Cir. 1994) 12, 13, 18

Shelly C. v. Venus Indep. School Dist., 878 F.2d 862, 864 (5th Cir. 1989) 14

Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 13

Texas Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 785, 792, 109 S. Ct. 1486, 1493, 103 L. Ed. 2d 866 (1989) 10, 20-23

Wheeler v. Towanda Area School Dist., 950 F.2d 128, 132 (3d Cir. 1991) 12, 14

Statutes Cited:

20 U.S.C. § 1412(5)(B) 3

20 U.S.C. § 1414(a)(1)(C)(iv) 4

20 U.S.C. § 1414(a)(5) 4

20 U.S.C. § 1415(e)(3) 5

20 U.S.C. § 1415(e)(4)(B) . . . . . i, 5, 9, 11, 13, 14

42 U.S.C. § 1988 . . . . . i, 10, 11, 13, 14, 20

Contents

Page

42 U.S.C. § 1988(b) 3

Rules Cited:

Supreme Court Rules:

Rule 10.1(a) 23

Rule 10.1(c) 23

Other Authorities Cited:

34 C.F.R. § 300.306 6

34 C.F.R. § 300.343(d) 6, 14, 16, 20

34 C.F.R. § 300.550(b) 6

34 C.F.R. § 300.551 7

34 C.F.R. § 300.552 7

34 C.F.R. § 300.553 8

APPENDIX

Appendix A – Order of the United States Court of Appeals for the Sixth Circuit Filed June 1, 1995 . . . . . App. 1

Appendix B – Judgment of the United States District Court for the Eastern District of Tennessee Filed February 15, 1994 . . . . . App. 3

Appendix C – Memorandum and Order of the
United States District Court for the
Eastern District of Tennessee at Knoxville
Filed December 2, 1993 ..... App. 5

Appendix D – Final Order of the Tennessee
State Department of Education
Dated May 4, 1992 ..... App. 13

Appendix E – Order of the United States Court
of Appeals for the Sixth Circuit
Filed July 7, 1995 ..... App. 27

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OPINIONS BELOW

A. *Raymond Rynes, by his parent and next friend, Deborah Rynes; Deborah Rynes, Individually*, CA #94-5349 (6th Cir., June 1, 1995, Order). (Appendix A, p. 1, *et seq.*)

B. *Raymond Rynes, by his parent and next friend, Deborah Rynes; Deborah Rynes, Individually*, Civ. #3-92-404 (E.D. Tenn., February 5, 1994, Judgment). (Appendix B, p. 3, *et seq.*)

C. *Raymond Rynes, by his parent and next friend, Deborah Rynes; Deborah Rynes, Individually*, (E.D. Tenn., February 5, 1994, Memorandum and Order). (Appendix C, p. 5, *et seq.*)

D. *In the Matter of: Raymond Rynes v. Knox County Board of Education*, Case #91-25 (Tennessee State Department of Education, May 4, 1992, Final Order). (Appendix D, p. 13, *et seq.*)

E. *Raymond Rynes, by his parent and next friend, Deborah Rynes; Deborah Rynes, Individually*, (6th Cir., July 7, 1995, Order denying petitioner's suggestion for rehearing *en banc*). (Appendix E, p. 27, *et seq.*)

GROUNDS FOR JURISDICTION

A. The judgment sought to be reviewed was entered on June 1, 1995, by the United States Court of Appeals for the Sixth Circuit. A petition for rehearing *en banc* was denied on July 7, 1995. The petition for writ of certiorari was filed within 90 days of that date.

B. Pursuant to 28 U.S.C. § 1254(1), the jurisdiction of the Supreme Court of the United States is invoked. The jurisdiction of the United States Court of Appeals for the Sixth Circuit was invoked pursuant to 20 U.S.C. § 1415(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 42 U.S.C. § 1988(b) (Proceedings in vindication of civil rights; attorney's fees; expert fees):

> (b) Attorney's fees.
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

B. 20 U.S.C. § 1412(5)(B) (Eligibility Requirements):

> (5) The State has established:
>
> (B) Procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

C. 20 U.S.C. § 1414(a)(1)(C)(iv) (Requisite features):

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this chapter for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall:

> (1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which:
>
> > (C) establish a goal of providing full educational opportunities to all children with disabilities, including:
> >
> > > (iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs.

D. 20 U.S.C. § 1414(a)(5)(Requisite features):

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this chapter for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall:

> (5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability

> (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in section 1477(d) of this title for each child with a disability ages 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually.

E. 20 U.S.C. § 1415(e)(3)(Civil action; jurisdiction; attorney fees):

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

F. 20 U.S.C. § 1415(e)(4)(B)(Civil action; jurisdiction; attorney fees):

> (B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

G. 34 C.F.R. § 300.306 (Nonacademic services):

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

H. 34 C.F.R. § 300.343(d)(Meetings):

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

I. 34 C.F.R. § 300.550(b) (Least Restrictive Environment) (General):

(b) Each public agency shall ensure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

J. 34 C.F.R. § 300.551 (Continuum of alternative placements):

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required under paragraph (a) of this section must–

(1) Include the alternative placements listed in the definition of special education under §300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

K. 34 C.F.R. § 300.552 (Placements):

Each public agency shall ensure that:

(a) Each handicapped child's educational placement:

(1) is determined at least annually,

(2) is based on his or her individualized education program, and

(3) is as close as possible to the child's home.

(b) Various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school where he or she would attend if he or she were not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

L. 34 C.F.R. § 300.553 (Nonacademic settings):

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §300.306, each public agency shall ensure that each child with a disability participates with non-disabled children in those services and activities to the maximum extent appropriate to the needs of that child.

STATEMENT OF THE CASE

This dispute arose in the summer of 1991 when the Knox County school system proposed placing Raymond Rynes, then twelve and suffering from a profound bilateral loss of hearing, in a less restrictive public school than the Tennessee School for the Deaf (TSD). The parents disagreed with the recommended placement, a self-contained public classroom with other age-appropriate deaf or hearing impaired peers, and, pursuant to the Individuals with Disabilities Education Act (IDEA), requested a due process hearing before an administrative law judge on July 3, 1991. On May 4, 1992, after a hearing on September 6, 1991, the administrative law judge determined that the school system had proposed an appropriate placement and had not violated the IDEA. The plaintiffs appealed to the District Court for the Eastern District of Tennessee pursuant to 20 U.S.C. § 1415(e).

After a non-jury trial on November 18, 1993, the District Court ruled on December 27, 1993, that plaintiffs were prevailing parties within the meaning of 20 U.S.C. § 1415(e)(4)(B) and were entitled to reasonable attorney's fees. District Court Memorandum and Order at App. 11. Prior to trial, the parties had stipulated that Raymond Rynes would continue his education at TSD. Thus, there was no issue as to the appropriateness of the proposed placement. District Court Memorandum and Order at App. 5.

The lower court noted the defendant's testimony as to why the school system had decided in a periodic evaluation in the spring of 1993, approximately one year after the administrative law judge had approved the school system's plan to mainstream Raymond, that Raymond stay at TSD. The school system had determined that while "(1) the case was in the appeal process, Raymond would stay at TSD until the case was decided, and the appeal would 'go on for some time

longer'; (2) Raymond was involved in athletics and other school activities at TSD; and (3) Raymond was already in the ninth grade and there would not be enough time to give him the additional training he would need, given the State requirements for completion of high school, if he were placed in a public school." District Court Memorandum and Order at App. 7.

The District Court considered the plaintiffs' purposes for appealing the administrative law judge's ruling. They sought: "(1) that Raymond be allowed to continue his education at TSD or in a program which is split between TSD and a public school; (2) that the defendants comply with state and federal statutes and regulations in conducting the multidisciplinary meeting and in making decisions concerning Raymond's placement; and (3) that Raymond be allowed to enroll at TSD without a referral from Knox County." District Court Memorandum and Order at App. 9. The lower court recognized the plaintiffs' goal in requesting an administrative hearing and then appealing, the continued placement of Raymond at TSD, yet concluded that, absent the proceedings instigated by the mother, including the lawsuit, Raymond would have been placed in public school. District Court Memorandum and Order at App. 10-11.

The District Court reasoned that the "prevailing party" standard set forth in the IDEA is similar to that in 42 U.S.C. § 1988 and applied a two-part test from *Johnston v. Jago*, 691 F.2d 283 (6th Cir. 1987), which it found to be consistent with the rule set forth in *Texas Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 785, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). District Court Memorandum and Order at App. 8-9. After asking whether the lawsuit had caused a change in the parties' legal relationship and whether the claim was frivolous, unreasonable, or groundless, the lower court held that the lawsuit was at least the catalyst for the defendant's eventual

decision to allow Raymond to remain at TSD and that the appeal from the hearing officer to the District Court was not frivolous, unreasonable, or groundless. District Court Memorandum and Order at App. 8, 11.

This appeal arises from the decision of the Sixth Circuit Court of Appeals, entered June 1, 1995, affirming the District Court for the Eastern District of Tennessee.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED WHEN IT AFFIRMED THE JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, WHICH FOUND PLAINTIFFS HAD PREVAILED AND WHICH REASONED THAT A "PREVAILING PARTY" WITHIN THE MEANING OF 20 U.S.C. § 1415(E)(4)(B) OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT SHOULD BE DETERMINED USING THE BUT-FOR TEST FOR AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988 FROM *JOHNSTON V. JAGO*, 691 F.2D 283 (6TH CIR. 1982).

The United States Court of Appeals for the Sixth Circuit, like several other circuits, has attempted to determine who is a "prevailing party" within the meaning of 20 U.S.C. § 1415(e)(4)(B) for attorney's fees purposes by looking to cases which define "prevailing party" under 42 U.S.C. § 1988. In this case, the Sixth Circuit affirmed the lower court's determination of prevailing party status, a determination made using *Johnston v. Jago*, 691 F.2d 283 (6th Cir. 1982) as the standard. *Johnston* entitled a civil rights plaintiff to attorney's fees who could prove that the lawsuit caused a change in the

parties' legal relationship and that the claim was not frivolous. 691 F.2d at 286. The but-for test, as was used by the lower court in this case, has been questioned by the Seventh Circuit and explicitly rejected. *See Brown v. Griggsville Community Unit School Dist. No. 4*, 12 F.3d 681 (7th Cir. 1993). Other Courts of Appeals, before and after this Court's opinion in *Farrar v. Hobby*, 506 U.S. ____, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992), have questioned what kind of causation, if any, an IDEA plaintiff must show to recover fees. *See e.g., Parents of Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 1498 (9th Cir. 1994) (plaintiff must show material alteration in legal relationship and causal link between litigation brought and outcome gained); *S-1 v. State Bd. of Educ. of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) (that lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party; catalyst theory no longer available after *Farrar*); *Combs v. School Bd. of Rockingham County*, 15 F.3d 357, 360-61, 363-64 (4th Cir. 1994) (plaintiff does not prevail where board actions were deemed in accordance with Act in administrative proceedings but board later made some changes that comported with student's demands; applicability of catalyst theory questioned); *Borengasser v. Arkansas State Bd. of Educ.*, 996 F.2d 196, 199-200 (8th Cir. 1993) (parents prevailed where they received all that they sought); *Phelan v. Bell*, 8 F.3d 369, 375 (6th Cir. 1993) (plaintiff must succeed on any significant issue and achieve some benefit sought in bringing suit; Kennedy, J., concurring in part and dissenting in part, "I cannot agree that plaintiff was a catalyst for the treatment plan that was adopted); *Krichinsky v. Knox County Schools*, 963 F.2d 847, 850 (6th Cir. 1992) (plaintiff must be able to point to resolution of dispute which changes the parties' legal relationship); *Wheeler v. Towanda Area School Dist.*, 950 F.2d 128, 132 (3d Cir. 1991) (plaintiffs prevail if relief is achieved and if there is a causal connection between litigation and relief; catalyst theory recognized); and *Mitten v. Muscogee*

County School Dist., 877 F.2d 932 (11th Cir. 1989) ("significant relief standard" the test for determining whether plaintiffs prevailed).

Each of the circuits which has decided when attorney's fees are authorized under the Individuals with Disabilities Education Act (IDEA) has referred to the Civil Rights Attorney's Fees Award Act of 1976, as amended at 42 U.S.C. § 1988. Each has come to a different conclusion as to when and how a plaintiff prevails. The Courts of Appeals thus have decided differently an important question of federal law which has not been settled by the Honorable United States Supreme Court. The last opportunity this Court had to review the appropriateness of attorney's fees under the IDEA was in 1984 in *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746, prior to Congress's 1986 amendment adding section 1415(e)(4)(B) to the IDEA. Because the Courts of Appeals have used civil rights precedents, including *Farrar*, to develop differing rules and to arrive at varying conclusions, and because proving a violation of one's right to a free and appropriate public education is not the same task as proving a violation of one's civil rights, a judicial defining of the IDEA "prevailing party" is needed.

The "but for" test used by this lower court and by others, *see Joiner v. District of Columbia*, 16 Educ. Handcpt. L. Rep. (LRP) 424 (D.D.C. 1990), should be abandoned. By its simplicity, the but-for test fails to account for the complex consequences which flow from the provisions of the IDEA by attributing to an attorney's litigation efforts what automatically follows from the statute. This, perhaps, is why the Seventh Circuit has rejected the but-for test and why the Fourth Circuit interpreted *Farrar* to mean a showing that a lawsuit operated as a catalyst for change is insufficient for fee purposes. *See Brown*, 12 F.3d at 684-85; *S-1*, 21 F.3d at 51. Besides settling an important question of federal law and

adding to the conflict among the circuits, the rule of the lower court in this case furthers a policy contrary to not only the purpose of the fee-shifting provision but to the IDEA itself. The fee-shifting provision was intended to enable parents and children to successfully challenge educational practices and policies which otherwise might go unremedied, *see Wheeler v. Towanda Area School Dist.*, 950 F.2d at 134. It was not intended to pay attorneys for the benefits of protections already placed in the statutory scheme by Congress, protections such as those in the "stay put" provision, 20 U.S.C. 1415(e)(3), and in the re-evaluation regulation, 34 C.F.R. § 300.343(d). When a court employs the but-for test, it can disregard whether the school system actually provided the child a free and appropriate education. It can disregard that the school system complied with the IDEA in every regard. By only asking whether the plaintiffs achieved their aim and by not accounting for other factors such as the child's cognitive, social, behavioral, and biological development during lengthy legal proceedings and the school system's duty to evaluate that development, a court gives no incentive to plaintiffs' attorneys to resolve conflicts quickly and reasonably in the child's best interest. Requiring local school systems to pay attorney fees, regardless of whether there was an inappropriate educational practice to remedy, adds a meaning to the term "prevailing party" that was never intended.

Section 1415(e)(4)(B) of the IDEA provides: "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." In enacting the fee-shifting statute, Congress looked to 42 U.S.C. § 1988 for guidance. *Shelly C. v. Venus Indep. School Dist.*, 878 F.2d 862, 864 (5th Cir. 1989), citing H.R. Rep. No. 296, 99th Cong., 1st Sess. 5-6 (1985); H.R. Conf. Rep. No. 687, 99th Cong., 1st

Sess. 6 (1985). Courts have continued to look to the civil rights fee-shifting statute in attempts to define what Congress did not in the IDEA. However, it is error to apply the same standards to the IDEA fee-shifting provision because of one procedure available as a matter of right under the IDEA that is unavailable in every other federal statute: the "stay put" provision of 20 U.S.C. § 1415(e)(3). Section 1415(e)(3) provides:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

The "stay put" provision renders the IDEA fundamentally different from all other federal legislation. The stay put provision guarantees that a child will remain placed in the system, where the child is at the time a request for a hearing is made, wherein he or she will be educated during the pending proceedings. Significantly, stay put does not guarantee that the placement and program will be appropriate ones where the child will educationally benefit and advance. Only by unilaterally changing the program or placement prior to the close of litigation can a school system violate stay put. *See* 20 U.S.C. § 1415(e)(3). "Stay put" thus refers to the child's program and placement, not to his or her educational development. In *Brown v. Griggsville Community Unit School Dist. No. 4*, 12 F.3d at 684-85, for example, the child's academic performance improved during the pendency of proceedings. In this case, by contrast, the testimony established that the proposed placement and program were

appropriate but because not enough time would remain after the litigation ended to give Raymond the additional training needed to meet Tennessee graduation requirements, the system would permit him to stay at the Tennessee School for the Deaf (TSD). District Court Memorandum and Order at App. 7. Under other federal schemes, extraordinary relief such as injunctions and temporary restraining orders may be available to keep a plaintiff in a position or to keep a defendant from taking certain action during the course of litigation, but only upon a showing of irremediable harm.

Regardless of whether stay put has been invoked, a school system has an obligation to review an eligible student's program and placement at least annually pursuant to 34 C.F.R. § 300.343(d), which provides: "Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year." During the stay put period, and less than two weeks before the scheduled due process hearing in *Brown*, such a meeting convened. 12 F.3d at 682. Similarly, such a meeting convened to consider Raymond Rynes' special education needs. District Court Memorandum and Order at App. 7. Through the meeting required by 34 C.F.R. § 300.343(d), both the Browns and the Rynes achieved what they sought – a decision by the school system that the child should remain in the present placement, the school which happened to be the parents' choice. In the case of the Rynes, it was because Raymond had greater needs at the time of periodic review than he did at the time stay put was invoked. *See* District Court Memorandum and Order at App. 7. In the case of the Browns, it was because of the child's improved academic performance in the local school during "stay put." 12 F.3d at 684-85.

The Seventh Circuit in *Brown* ruled that the plaintiffs were not prevailing parties, the antithesis of the Sixth Circuit's opinion in this case. Perhaps the slight factual differences in the cases have some bearing on why two circuits considering the identical issue would rule differently. For example, the "stay put" period in *Brown* lasted one year, *see* 12 F.3d at 682, whereas the stay put period here was longer, *see* District Court Memorandum and Order at App. 7. Also, the proceedings in district court were more extensive in this case than in *Brown*. The extensiveness of district court proceedings, however, was not of particular concern to the Seventh Circuit given it found "[t]he fact that a case referred to a magistrate terminates with him does not disentitle the prevailing plaintiff to an award of attorney's fees if a statute allows such an award in the particular class of case." *See* 12 F.3d at 684.

More likely, it is the Circuits' contrasting views of what kind of causation a plaintiff must show in order to recover attorney's fees that account for the Seventh denying and the Sixth granting fees. Plaintiffs' counsel in *Brown*, like the Rynes' counsel, argued that "but for" a request for a due process hearing and the consequent activation of the "stay put" provision of the IDEA, the child would have been transferred to a school different from the one desired by the parents. *See* 12 F.3d at 684; District Court Memorandum and Order at App. 7, 10. The Seventh Circuit addressed that argument as follows:

> As we have been busy emphasizing lately, however, 'but for' is not an adequate conception of cause, [citations omitted], and the question whether a party prevailed because of the legal proceeding rather than for some other reason is, at a minimum, a question about causality. [Citations omitted.] The qualification 'at a minimum' is a bow in the direction of *Farrar v.*

Hobby, ___ U.S. ____, ____, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494 (1992), where in dictum the Supreme Court suggested that not only must the lawsuit be a catalyst of legal change favorable to the plaintiff but the plaintiff must have obtained relief through a judgment or a settlement. On this view, the fact that a lawsuit had stimulated legislative reform or induced the defendant to take 'voluntary' measures that gave the plaintiffs what they wanted without benefit of a judgment or settlement would not justify awarding them attorneys' fees.

There is certainly some merit to this view; it would be odd to reward with attorney's fees a plaintiff who had induced the defendant to toss him a bone merely to avoid the expense of defending against an unmeritorious suit; it would be adding injury to injury. But we need not attempt to resolve the question, which recently divided a panel of the Fourth Circuit and led the full court to grant rehearing *en banc*. *S-1 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993), opinion vacated, Oct. 21, 1993. We can instead assume that the issue for resolution is whether the cause of the Brown child's remaining in the local school was the legal proceeding commenced by the parents' request for a hearing, or, as the school district argues and the district judge found, the school board's annual review of the child's status. The review would have taken place whether or not the Browns had requested a hearing, and, as far as appears, would have reached exactly the same result. The child did better in the local school during the 'stay put' year than he had done previously and it was the improvement in his performance that persuaded the board to change its decision to transfer him, not the fact that it faced a lawsuit if it did not

> change its decision; so at least the district judge found, not clearly erroneously.

Brown, 12 F.3d at 684-85.

The Seventh Circuit further recognized that a request for a hearing is plausibly a "but for" cause of a child remaining indefinitely where the parents want him to be. 12 F.3d at 685. The Seventh Circuit then rejected the but-for argument, stating, "[A] proper concept of causation requires more, requires that the putative cause also have made the consequence more likely to occur." *Id.* According to the Seventh Circuit, there is a difference in a school board changing its mind as a settlement and a school board changing its mind for reasons unrelated to the legal proceeding, and there is a difference in the "relief" of delaying a change in placement which follows from the statute and the relief which follows from a legal proceeding. *Id.* Attorney's fees are appropriate when a school board changes its mind as a settlement to avoid litigation losses, but "[i]f the board changed its mind for reasons unrelated to the legal proceeding (except in the 'but for' sense), the change is not aptly described as a settlement." *Id.* After emphasizing that the determination of prevailing status requires "at a minimum a finding that the lawsuit he filed was a cause, in the same sense in which we speak of 'cause' in tort and criminal law, of the attaining of his objective in bringing the suit," the Seventh Circuit noted that its point may have some general application to other fee-shifting statutes, but chose not to explore the ramifications. *Id.*

The District Court for the Eastern District of Tennessee, which was affirmed by Order of the Sixth Circuit Court of Appeals, did not recognize a difference between a change of mind to settle the controversy and a change of mind unrelated, except in the but-for sense, to the legal proceeding.

See District Court Memorandum and Order at App. 7, 10, 11. Moreover, the District Court did not refer to the school system's duty to periodically evaluate under 34 C.F.R. § 300.343(d) but instead found "it was only because of the proceedings that Knox County found themselves in a position to have to re-evaluate Raymond's placement." *See* District Court Memorandum and Order at App. 10. The District Court therefore did not recognize a difference in the consequences which follow from the statute, from the "stay put" and periodic evaluation provisions, and in the accomplishments of an attorney through litigation. *See* District Court Memorandum and Order at App. 9-10. When the District Court stated, "Obviously, absent the proceedings instigated by the mother, including the lawsuit filed in this court, Raymond would have been placed in public school, since that was Knox County's recommendation for placement," it was not referring to any accomplishment brought about by an attorney's efforts; it was talking about consequences which follow from the stay put and periodic evaluation provisions. *See* District Court Memorandum and Order at App. 10.

In response to the plaintiffs' argument that they had received substantially all the relief they wanted since Raymond would be allowed to stay at TSD to complete his schooling and in response to the school system's argument that no causal connection existed between the decision to allow the child to stay at TSD during the pending civil action, the District Court equated the IDEA "prevailing party" standard to that in 42 U.S.C. § 1988 and cited two United States Supreme Court cases and one Sixth Circuit case that preceded *Farrar*. District Court Memorandum and Order at App. 8-9, citing *Texas Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 785, 792, 109 S. Ct. 1486, 1493, 103 L. Ed. 2d 866 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983); *Krichinsky v. Knox County*

Schools, 963 F. 2d. 847 (6th Cir. 1992). The District Court stated the minimum requirements under *Texas Teachers Ass'n* to be a prevailing party for civil rights purposes: success on any significant issue which achieves some of the benefits plaintiffs sought in bringing suit and the ability to point to a resolution of the dispute which changes the parties' legal relationship. District Court Memorandum and Order at App. 8.

Then, however, the District Court determined that plaintiffs had prevailed using a test which preceded *Texas Teachers Ass'n* and *Farrar* because it considered the two-part standard in *Johnston v. Jago*, 691 F. 2d 283, 286 (6th Cir. 1982), to be consistent with the rule in *Texas Teachers Ass'n. Id.* at App. 8-9. *Johnston*, which addressed a civil rights plaintiff's entitlement to fees, requires only a showing that the lawsuit caused a change in the parties' legal relationship and that the claim was not frivolous, unreasonable, or groundless. 691 F.2d at 286. The District Court then likened its reasoning to that in *Joiner v. District of Columbia*, 16 Educ. Handcpd. L. Rep. (LRP) 424 (D.D.C. 1990). District Court Memorandum and Order at App. 10-11. The District Court for the District of Columbia also did not distinguish between the statute's requirement, that the school system (which had previously violated "stay put") pay for the private placement of the parents' choosing while proceedings were pending, and an attorney's litigation accomplishment. *See* 16 Educ. Handcpt. L. Rep. at 424-25. The *Joiner* court likewise viewed "[a]chievement of objectives" as "the bench-mark for an award of attorneys' fees" and referred to civil rights cases preceding *Farrar*. 16 Educ. Handcpt. L. Rep. at 425. The lower court here reckoned, "In *Joiner*, 'but for' the lawsuit, the child would be attending the school recommended by the hearing officer. In this case, 'but for' the lawsuit, Raymond would be in public school instead of TSD as recommended by the ALJ. Therefore, we find that both parts of the *Johnston* standard

have been met in this case: (1) the lawsuit was at least the catalyst for the defendants' [sic] eventual decision to allow Raymond to remain at TSD; and (2) the appeal to this court was not frivolous, unreasonable, or groundless." District Court Memorandum and Order at App. 11.

The *Johnston* test used by the lower court fails to separate those cases where plaintiffs prevail because of an attorney's successful efforts and those cases where, as here, plaintiffs achieve their objectives because of the protections of the IDEA. Achievement of objectives, contrary to *Joiner*, is not the standard set for civil rights plaintiffs in *Farrar*, which provided:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt* [*v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 3099, 1486, 96 L.Ed.2d 654 (1987)] ..., or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *See Hewitt*, *supra*, at 764 [citations omitted]. Otherwise the judgment or settlement cannot be said to 'affec[t] the behavior of the defendant toward the plaintiff.' *Rhodes* [*v. Stewart*, 488 U.S. 1, 4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988)] .... Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. [*Texas State Teachers Ass'n v.] Garland [Independent School Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1489, 103 L.Ed.2d 866 (1989)]. In short, a plaintiff 'prevails'

> when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

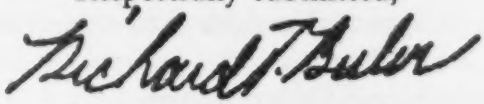
Farrar, 121 L.Ed.2d at 503. *Farrar* exacts a greater showing of causation in civil rights cases than the court did in this case when it asked "but for the lawsuit." *See* District Court Memorandum and Order at App. 11. A stricter showing of causation than even the *Farrar* test would have been appropriate given the procedural protections afforded to only IDEA plaintiffs. If, however, *Farrar* and *Texas Teachers Ass'n* only require the accomplishment of objectives, they should not be used to award fees unless counsel's efforts, not the statute's protections, accomplish the objective. The question should have been "would plaintiffs have been pleased but for the attorney's efforts?" and not whether "but for the lawsuit." Mere proof that the parents got what they wanted should not be sufficient. To hold otherwise would entitle plaintiffs to fees whose only goal is to delay an appropriate change in placement and who successfully achieve that goal through stay put. The moral satisfaction of accomplishing an objective, like the moral satisfaction resulting from a favorable statement of law, should not bestow prevailing party status. *See Farrar*, 121 L.Ed.2d at 504, citing *Hewitt*, 482 U.S. at 762, 107 S.Ct. 2672, 96 L.Ed.2d 654.

The petitioner would submit that the District Court decision, as affirmed by the Sixth Circuit, seriously misreads the intent of Congress, misapplies the decisions of this Court, and disregards the well-reasoned decisions of other circuit courts. This unprecedented decision represents such a departure from past court practice and is so novel that this Court should exercise its power of supervision as called for by Rule 10.1(a) and 10.1(c) of the Rules of the Supreme Court.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,



RICHARD T. BEELER
Knox County Law Director
JOHN E. OWINGS
Knox County Chief Deputy Law Director

Attorneys for Petitioner

APPENDIX A – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 1, 1995

Case No: 94-5349

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

RAYMOND RYNES, by his parent and next friend, Deborah Rynes; DEBORAH RYNES, Individually,

Plaintiffs-Appellees

v.

KNOX COUNTY BOARD OF EDUCATION;

Defendant-Appellant

CHARLES E. SMITH, Tennessee Commissioner of Education; THE TENNESSEE DEPARTMENT OF EDUCATION,

Defendants

BEFORE: KRUPANSKY, MILBURN, BATCHELDER, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B-- JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE FILED FEBRUARY 15, 1994

No. CIV 3-92-404

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

RAYMOND RYNES, by his parent and next friend, DEBORAH RYNES, and DEBORAH RYNES, Individually,

Plaintiffs,

v.

KNOX COUNTY BOARD OF EDUCATION, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

It is ORDERED AND ADJUDGED that the plaintiffs RAYMOND RYNES and DEBORAH RYNES, as prevailing parties, recover of the defendant KNOX COUNTY BOARD OF EDUCATION attorneys fees and costs in the amount of TWENTY-THREE THOUSAND, NINE HUNDRED

SIXTY-NINE DOLLARS AND EIGHTY-FIVE CENTS ($23,969.85) with interest thereon at the rate of 3.74 per cent as provided by law.

[stamped]
ENTERED AS A JUDGMENT
R. MURRAY HAWKINS, CLERK

By s/ Doug Johnson
Dep. Clerk

Date February 15, 1994
Enter Book 148 Page 22

APPENDIX C -- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE FILED DECEMBER 2, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

No. CIV 3-92-404

RAYMOND RYNES, by his parent and next friend, DEBORAH RYNES, and DEBORAH RYNES, Individually,

Plaintiff,

v.

KNOX COUNTY BOARD OF EDUCATION, et al.,

Defendants.

MEMORANDUM AND ORDER

This is a civil action pursuant to the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§1400, et seq. The plaintiffs Raymond Rynes and his mother Deborah Rynes have appealed the decision of an administrative law judge (ALJ) concerning the appropriate educational placement of the minor plaintiff Raymond Rynes. The non-jury trial in this civil action was heard on November 18, 1993. Prior to trial, the parties had stipulated by means of a joint pre-trial order, that Raymond could continue his education at the Tennessee School for the Deaf (TSD), contrary to the defendants' earlier decision. [Doc. 15]. This, it was unnecessary for this court to decide whether TSD was an appropriate placement, and the only remaining issue at trial was whether the plaintiffs are

prevailing parties within the meaning of the IDEA. 20 U.S.C. §1415(e)(2). [1]

The basis for this civil action was the defendants' decision to change Raymond's educational placement from TSD to a school within the Knox County Public Schools. The Knox County Public School System conducts a program for the education of deaf and hearing impaired students, some of whom are educated within the Knox County Public Schools and some of whom are referred for placement by Knox County to TSD, a State-operated school. The local school system must make the initial decision of whether to place a student at TSD. TSD will not enroll students who have not first been referred to TSD by the local school system, ordinarily precluding direct enrollment of deaf students without the consent or approval of the local district.

Raymond suffers from a profound bilateral hearing loss due to an injury and/or infection. At the time his hearing loss occurred, Knox County recommended that Raymond be placed at TSD. In 1990, Knox County decided that the appropriate placement for Raymond would be in a Knox County School rather than TSD. Plaintiffs requested a hearing before an ALJ; however, the matter was settled by agreement prior to a hearing. As a result of the agreement, Raymond remained at TSD.

On June 25, 1991, a multidisciplinary team meeting was held for the purpose of developing an Individualized

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[1] The parties had identified two other procedural issues, but given the agreement on the child's placement at the Tennessee School for the Deaf, counsel announced to the court that the procedural issues were no longer relevant.

Educational Program (IEP) for Raymond for the 1991-92 school year. Knox County again recommended that Raymond be removed from TSD and placed in a public school. And again, the plaintiffs requested a hearing before an ALJ, which was held on September 6, 1991. On May 4, 1992, the ALJ entered a Final Order approving the placement of Raymond in a school system class for hearing impaired with appropriate mainstreaming [doc. 4, at pp. 2-16]. Plaintiffs appealed this decision by filing suit in federal district court.

In the Spring of 1993, while this civil action was pending, Knox County decided that the best placement for Raymond at that time was TSD. Ms. Shaver, an audiologist for Knox County Public Schools, testified that the reasons for this decision were: (1) the case was in the appeal process, Raymond would stay at TSD until the case was decided, and the appeal would "go on for some time longer"; (2) Raymond was involved in athletics and other school activities at TSD; and (3) Raymond was already in the ninth grade and there would not be enough time to give him the additional training he would need, given the State requirements for completion of high school, if he were placed in a public school.

The plaintiffs now argue that since they have received substantially all the relief they wanted; that is, that Raymond be allowed to stay at TSD to complete his schooling, they are prevailing parties and entitled to attorneys' fees and expenses pursuant to 20 U.S.C. §1415(e)(4)(B). The defendants argue that there was no causal connection between their decision to allow Raymond to continue his education at TSD and the civil action pending in this court and therefore, plaintiffs are not prevailing parties.

The "prevailing party" standard set forth in the IDEA [2] is similar to that in 42 U.S.C. §1988, which allows the award of attorneys' fees in civil rights cases. See, *Texas Teachers Ass'n v. Garland Indep. School District*, 489 U.S. 785, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Krichinsky v. Knox County Schools*, 963 F.2d 847 (6th Cir. 1992). In *Texas Teachers Ass'n*, the Supreme Court reiterated the definition of the prevailing party set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983): Plaintiffs may be considered prevailing parties if they "succeed on any significant issue which achieves some of the benefits plaintiffs sought in bringing suit." *Id.* At a minimum, to be considered a prevailing party for purposes of fee awards, "a plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas Teachers Ass'n*, 489 U.S. 792, 109 S.Ct. 1493.

Prior to *Texas Teachers Ass'n*, the Sixth Circuit had adopted a two-part standard for determining whether plaintiffs are prevailing parties: (1) whether the lawsuit has caused the legal relationship between the parties to change; and (2) whether the plaintiffs' claim is frivolous, unreasonable, or groundless. *Johnston v. Jago*, 691 F.2d 283, 286 (6th Cir. 1982); *see also*, *Haskell v. Washington Township*, 864 F.2d 1266, 1279 (6th Cir. 1988) (plaintiff may also be a prevailing party if his lawsuit is the "catalyst" for the changes sought).

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[2]Section 1415(e)(4)(B) provides:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

This Court finds that the *Johnston* standard is consistent with the rule set forth in *Texas Teachers Ass'n* and will apply the *Johnston* standard in order to determine whether the resolution changed the legal relationship between the parties.

Before this two-part standard can be applied to the facts of this case, it is necessary to set out the particular relief the plaintiffs sought in their complaint. The plaintiffs requested: (1) that Raymond be allowed to continue his education at TSD or in a program which is split between TSD and a public school; (2) that the defendants comply with state and federal statutes and regulations in conducting the multidisciplinary meeting and in making decisions concerning Raymond's placement; and (3) that Raymond be allowed to enroll at TSD without a referral from Knox County.

There is no doubt that what the plaintiffs hoped to achieve by requesting a hearing and then appealing the findings of the ALJ was for continued placement at TSD for Raymond. This result has been achieved; however, the defendants claim that the lawsuit was not the catalyst for the result, and therefore, the first part of the standard has not been met. The defendants claim that the recommendation to allow Raymond to remain at TSD was merely an administrative decision based on relevant factors for placement of hearing impaired children. The defendants submit that they have a continuing duty to re-evaluate a child's placement and, during the time that the lawsuit has been pending in this court, the factors concerning the proper placement for Raymond have changed. The defendants argue that a finding that the plaintiffs are prevailing parties puts Knox County in a difficult position – if they do their duty, they have to pay attorney fees.

The plaintiffs argue that they have achieved essentially all they had hoped to achieve, that they did so by means of the

lawsuit, and that are prevailing parties. The facts of this case support the plaintiffs' argument. In 1991, Knox County recommended that Raymond be removed from TSD and placed in public school. Raymond's mother requested a hearing before an ALJ which triggered the "stay put" provision of the IDEA. Section 1415(e)(3) of Title 20, United States Code, provides in relevant part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child....

Thus, Raymond stayed at TSD during the pendency of all the proceedings including the hearing before the ALJ and the lawsuit filed in this court.

Obviously, absent the proceedings instigated by the mother, including the lawsuit filed in this court, Raymond would have been placed in public school, since that was Knox County's recommendation for placement. The reasons given by the defendants for changing their recommendation are certainly all valid, but the fact remains that it was only because of the proceedings that Knox County found themselves in a position to have to re-evaluate Raymond's placement. In fact, Ms. Shaver testified that one of the factors that Knox County considered when re-evaluating Raymond's placement was that the mother had appealed the ALJ's decision and that Raymond was going to be at TSD for some time longer because of the appeal.

Counsel for plaintiffs has provided this court with a copy of a similar case from the District Court for the District of Columbia. *Joiner v. District of Columbia*, 16 Educ. Handcpd. L. Rep. (LRP) 424 (D.D.C. 1990). In *Joiner*, the parties had

agreed to allow the child to continue at a special school until his graduation in spite of a hearing officer's determination that the school recommended by the defendant school system was appropriate. The defendants argued that the plaintiffs were not prevailing parties because the defendants merely surrendered to the placement of the child in the special school. The District Court held that, although plaintiffs did not obtain *de jure* declaratory and injunctive relief, "plaintiffs achieved through this litigation their paramount objective of maintaining Christopher at Chelsea until he graduated. Defendants, well aware that this was plaintiffs' foremost goal, consented to a continuance that they knew would result in the goal's realization. Thus, the parties reached a *de facto* settlement." *Id.* at 425.

This court cannot find any substantive difference between the settlement agreement in *Joiner* and the defendants' decision to allow Raymond to stay at TSD in this case. Plaintiffs in *Joiner* and in this case achieved their foremost goals because the lawsuits were filed. In *Joiner*, "but for" the lawsuit, the child would be attending the school recommended by the hearing officer. In this case, "but for" the lawsuit, Raymond would be in public school instead of TSD as recommended by the ALJ.

Therefore, we find that both parts of the *Johnston* standard have been met in this case: (1) the lawsuit was at least the catalyst for the defendants' eventual decision to allow Raymond to remain at TSD; and (2) the appeal to this court was not frivolous, unreasonable or groundless. We find that the plaintiffs are prevailing parties within the meaning of 20 U.S.C. §1415(e)(4)(B), and are entitled to reasonable attorneys' fees.

It is hereby ORDERED that plaintiff's counsel shall file, on or before December 31, 1993: (1) a request for reasonable

attorneys' fees particularly identifying the amount of time expended and the reasons therefor; (2) affidavit(s) supporting the rate per hour requested; and (3) a list of reasonable costs and expenses incurred by counsel in this case.

Enter:

s/ Leon Jordan
Leon Jordan
United States District Judge

APPENDIX D -- FINAL ORDER OF THE TENNESSEE STATE DEPARTMENT OF EDUCATION DATED MAY 4, 1992

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

No. 91-25

IN THE MATTER OF:

RAYMOND RYNES

v.

KNOX COUNTY BOARD OF EDUCATION

FINAL ORDER

Case No. 91-25

I.
PROCEDURAL HISTORY

A Due Process Hearing was requested in this matter by letter dated July 2, 1991. The matter was originally scheduled for hearing on August 1-2, 1991 and by agreement of parties was rescheduled and heard on September 6. The parties filed post-hearing briefs. The 45-day rule for rendering a decision after request for hearing was waived by both parties. Both parties were represented by counsel and have made factual and legal presentations on behalf of their respective positions.

The case involves a student born in November of 1978 who suffers from profound sensorineural hearing loss

bilaterally, as a result of being struck by a motor vehicle March 12, 1984, and/or meningitis, which followed. In 1984 the school system identified this student as needing special education and enrolled him in a summer speech therapy program. The school system placed the student at Tennessee School for the Deaf (TSD) beginning in 1984 and the placement has continued. School system members of the M-Team, beginning at least as early as 1988 favored placement of the student in a system public school. That placement has been resisted by the parent or parents and TSD M-Team participants. The September 1988 Individualized Educational Plan (IEP) included a provision that the parent was to observe public schools after which the M-Team would reconvene and discuss mainstreaming with the parent. In March of 1989 the M-Team reviewed placement for the remainder of the year and determined that the student would continue at TSD for three hours 40 minutes and attend a school system elementary school for two hours and 45 minutes each day.

The December 1989 IEP provided that the student would continue placement at TSD until January 16, 1990 when the program would be provided at a system middle school. TSD personnel present and the parent disagreed and refused to sign. A due process hearing was requested and subsequently there was entered an agreed order of settlement dated October 1, 1990 providing considerations for future placement decisions. The student remained at TSD.

The IEP developed in March and April of 1991 recognized that the placement for the 1991-92 school year was an issue to be considered after the development of the IEP program for that year. The IEP which provided placement for a system school and is the subject of this hearing was dated June 25, 1991.

II. ISSUES

The issues presented in this case concern the placement decision for the IEP and the procedure by which placement was determined as compared to the agreed order entered October 1990.

III. DISCUSSION

A. PROCEDURAL ISSUE

It is clear the school system and all persons present at the M-Team meeting were well aware the parent and educational professionals at TSD favored the student remaining at TSD. The other factors set forth in the agreed order would have been considered to some degree in developing the IEP and determining placement. A system member present at the M-Team meeting testified that, although each listed factor was not discussed in order, all of them would have been considered.

Placement for this student has been an ongoing consideration at M-Team meetings and it appears those in attendance have expressed their opinions and desires. The school system has made efforts to move the student into a system school over a period of years and has proceeded with hopes the parent would agree to such a placement. The parent has resisted moving the student from TSD with hopes that the system would agree to her choice. The parent and all educational professionals in attendance at the M-Team meetings have been seeking the educational placement which, in their individual opinions, would be best for this student.

B. PLACEMENT ISSUE

The placement decision presents a conflict between parental choice and the school system's legal obligation to

provide an appropriate education in the least restrictive environment. The choice of the parent would be for the student to attend schooling at TSD and participate in extra-curricular and social activities where all students have similar communication methods. Testimony indicated it was a normal desire to be with persons of similar abilities.

The school system has the obligation to place the child in an educational setting with children that have no disability to the greatest extent appropriate. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). 20 U.S.C. § 1412(5)(B); 20 U.S.C. § 1414(a)(1)(C)(iv); Tennessee Code Annotated, § 49-10-103(c)(1). *See also* 34 C.F.R. 104.33-37.

34 C.F.R. 300.550 provides, in part, that the state must establish "procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." A portion of 34 C.F.R. 300.553 provides that the school system "shall insure that each handicapped child participates with non-handicapped children. . .to the maximum extent appropriate to the needs of that child" in non-academic and extra-curricular services and activities, including meals, recess periods, counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to agencies which provide assistance to handicapped persons and employment of students. 34 C.F.R. 300.553 and 300.306. Each school system is required to make available a continuum of alternative placements to meet the needs of handicapped children and to include "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. 300.551.

Although there is a strong preference for mainstreaming in education of handicapped students, it is not the goal. The needs of the child remain paramount. There must be an appropriate education for the individual student. Mainstreaming more than appropriate for the individual student would be contrary to the legal requirement. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1049 (5th Cir. 1989). 34 C.F.R. 300.552(a)(2); 34 C.F.R. 300.552(d).

The oral/aural, verbotonal, and total communication approaches to deaf education and communication for the deaf and hearing impaired were the primary focus of the evidence presented by the school system in the hearing. There is obviously disagreement, not only in this state or portions of this state, but on a much broader scale, as to the effectiveness different approaches to deaf education. *See Visco by Visco v. School District of Pittsburgh*, 684 F.Supp. 1310 (W.D.Pa. 1988).

The testimony and witness example offered by the school system as to potential benefits of the verbotonal system and oral-aural method exceeded that which was relative to this student and this placement decision. It was clear from the evidence that the achievement illustrated at the hearing was the result of many, many hours and years of intensive program services. The proposed IEP and testimony of witnesses never suggested such efforts would be made for this student or that the benefits attained by the witness example would be pursued for this student. This student witness and the system are to be commended for their respective efforts to obtain these benefits for her. The witness example received verbotonal training for five hours, five days each week from ages 2½ to 6 years and received continued training of lesser amounts afterwards.

The evidence discloses there is a total communication environment present in the educational setting at both

facilities. The presentation by the school system at the hearing was that the student would be better served in an environment which would not permit total manual communication and would, thereby, more likely prepare him to function in society as an adult than remaining in the current placement. Although the court in *Visco*, *supra*, decided against removal from a special school and stated it was not for the court to select between methods of instruction for hearing impaired, one reason for the decision was the emphasis on communication in the special school. The court found the potential benefit from an emphasis on mastering language skills, oral-aural instruction in the special school, when the child would complete the special school and enter public school in the 10th grade, outweighed the potential benefit of mainstreaming in a public school which offered total communication instruction. *Visco*, *supra*, 684 F.Supp. at 1316.

The factual situation under consideration is somewhat different. The change to system school placement in this case is intended to emphasize instruction directed to mastering language skills using the oral-aural method and at the same time satisfy the preference for mainstreaming. The total communication instructional setting is readily available in the system school depending upon the needs of the individual student.

Testimony by a system witness, based upon review of the audiogram of the student involved in this hearing, was that this student would need daily intervention and maybe after two or three years, one could see improvement in his ability to listen and speak. Testimony by another system witness was that the IEP would include three individual one-half hour verbotonal therapy sessions weekly and that this type of speech and auditory training, in addition to individual

therapy, would be provided in the academic portion of the schooling program.

The apparent lack of tolerance between the school system and TSD as to the possible differences in approaches to deaf education is unfortunate. TSD provides a valuable service to students from this and other school systems and students could benefit from more combined efforts of educational programs. This is not to say that professionals will not and should not disagree on educational programs and placements. Disagreement and consideration of the opinions of others should be part of the ongoing IEP development process.

TSD was the selected placement for this student by the school system originally and for subsequently developed IEPs. Testimony of witnesses called on behalf of the school system was that the student now should be placed in a system school and receive auditory training. Educators in the system believe they have developed programming for the hearing impaired students that offers greater educational opportunity for this student than is now available to him at TSD. They believe the student would receive more educational benefit in this placement and that it is the least restrictive appropriate environment. The evidence presented concerning observations of the student in the system school setting was that he participated and performed satisfactorily.

Witnesses for the parent believe TSD is a less restrictive environment than the proposed system school placement and for social and emotional considerations TSD would be better for the student. Evidence shows that in addition to the handicapping condition, the student has experienced several other traumatic experiences. A psychologist called as a witness by the parent testified the TSD program met the social and psychological needs of the student, which are most important at this age. He testified that in his opinion,

placement in a school system setting would be more restrictive than at TSD. He further testified that he did not believe communication was a primary focus for this student. He was generally not favorable to the verbotonal program of auditory training for hearing impaired.

C. INDIVIDUALIZED EDUCATIONAL PROGRAM

The appropriateness of the IEP was not at issue in this hearing. It could be implemented at either TSD or the system school even if implementation required a cooperative effort, which testimony indicated occurred in other situations. The disputed question was one of placement although it is also necessary to discuss the IEP.

Based upon the IEP presented and considered at the due process hearing the question could be whether a system school with instruction in a self-contained class or a segregated school for the deaf and hearing impaired is the least restrictive environment in which the student could receive his individual education program. The IEP, as written, only provides for special education. It provides no mainstreaming for academics or non-academic services. The class proposed for the student contained six or seven hearing impaired students, five of which were known to the student. Two were in his classroom at TSD last year and three he had met in the class he attended for part of the day in the school system. Most of these students were deaf. The system school of placement is not the zoned school for the student. The system school of placement is approximately the same distance from the student's home as TSD.

The question for decision will not be so limited. Testimony disclosed that the IEP development and placement selection has been a frustrating process for M-Team members. The testimony of witnesses called by the school system clearly

indicated the IEP, as written, was not the program which would have been implemented if the placement had been accepted by the parent. Testimony of a system witness that had been involved in the original M-Team in 1984 and had participated in most M-Team meetings concerning this student, including the June 25, 1991 meeting, testified that she would change the IEP in several respects.

The exhibits and testimony established that the student was in need, and had been in need for some period of time, of satisfactory personal amplification, Additionally, the exhibits and testimony indicate that summer programming had been considered and was being readied for summer school following the 1991 IEP. There was testimony that if the SUVAG II was used in verbotonal instruction, at least in a diagnostic evaluation process, a minimum of three hours a week for some period of time would be required. Testimony was that the SUVAG II was intended to be used in the summer programming for the student when satisfactory personal amplification was obtained.

Further, the psychological report regarding the student discloses that a mild language deficit may exist and further diagnosis would be appropriate. The report indicates there is evidence of visual motor perceptual deficit and information processing deficit, and the student might be a special education candidate even if not hearing impaired. A school system witness agreed there may be some deficit or disorder based upon the reported results. The recommendation of the school system witness was that auditory training should be initiated with careful observation and documentation of results. The witness indicated it was more of a process than an actual test and that if the student was unable to process language matters, the possible disorder might be disclosed.

There was testimony of the need of the student for counseling services and as to the availability of such services in the school system. There will no doubt be some concern and uncertainty in transition from TSD to any system school.

IV. FINDINGS AND CONCLUSIONS

The conduct of the M-Team in developing an IEP and making a placement determination did not interfere with the parent's right to participate in the IEP process and it did not adversely affect the appropriateness of the program development and proposed placement.

Although the format of the M-Team meeting, in view of the agreed order, was not ideal, there was no violation of the agreed order so as to affect the placement decision.

Parental choice and student choice are proper factors to be considered by an M-Team in making a placement decision. Parents have the authority, and even the responsibility, to participate in developing a student's school program and to obtain review if not satisfied with the program. *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 368, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). Rules and Regulations of the State of Tennessee, Rules 520-1-3-.09(3)(c)(11)(iv), 520-1-3-.09(1)(l)(3), and 520-1-3-.09(4)(b)(5).

Allowing parental choice to control in view of a contrary determination by school system professionals would be contrary to the requirements of law. *See Bina*, 18 IDELR 582 (OSERS 1991); *Burton*, 17 EHLR 1182 (OSERS 1991); and *Clinton*, 17 EHLR 1107 (OSERS 1991).

Individualized educational programs are subject to review. They must be reviewed at least once a year and are subject to

more frequent review, if appropriate. 20 U.S.C., § 1414(a)(5). 34 C.F.R., § 300.343(d).

The student does have residual hearing and is a candidate for auditory training even though the results are not predictable with any degree of certainty at this time.

Communication is an important focus in education of hearing impaired and should also be in the IEP for this student.

TSD is not the least restrictive appropriate environment for this student to be provided educational and related services.

Under the policy favoring mainstreaming, and based upon all evidence presented, placement in a system school is appropriate. It is reasonably calculated to enable the student to receive educational benefits.

The student should be afforded this opportunity to receive the educational benefit and to be mainstreamed to the extent appropriate.

A change in placement should not be undertaken without due consideration. A proposed change in placement for this student has been deferred in the past pending further consideration which has resulted in the proposed placement in a system school.

Although a change in placement may present some concern and uncertainty for the student, positive encouragement and support of parent and educational professionals could aid the transition process.

This student should be provided the following: a revised IEP; summer programming as originally intended, including auditory training, and to facilitate the transition; selection and obtaining of appropriate personal amplification, if not already complete; and, placement at a system school with the academic program and other activities provided, to the maximum extent appropriate, with non-handicapped students.

V. ORDER

1. Placement of this student in a system school class for hearing impaired with mainstreaming to the extent appropriate is approved.

2. If not previously accomplished, selection and obtaining of personal amplification for this student shall be completed without delay.

3. The student's skills shall be observed, measured and/or determined in some manner so that an M-Team can decide whether he can function in a regular math class with an interpreter and, also, whether there are any other regular classes he may be capable of functioning in.

4. Summer programming shall be developed for this student to include auditory training and programming to facilitate transition in placement from TSD to the system school. If diagnostic evaluation has not been performed, it shall be included in the summer programming. Introduction of a school system counselor at this time should be considered.

5. An M-Team meeting shall be scheduled to develop the IEP for 1992-93 school year. The student shall participate with non-handicapped children to the maximum extent

appropriate in academic and non-academic and extra-curricular services and activities.

6. The M-Team shall consider the psychological report submitted as an exhibit at the due process hearing, at least as it relates to possible deficit or disorder other that hearing which might constitute a learning disability or handicap for this student, and determine whether any further evaluation or testing would be appropriate.

7. Counseling shall be provided for in the 1992-93 school year IEP.

8. This decision shall be binding upon both parties unless the decision is appealed. Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of entry of a final order in non-reimbursement cases or three (3) years in cases involving educational cost and expenses. In appropriate cases the review in Court may order that this final order by stayed.

This 4th day of May, 1992.

s/ Jack E. Seaman
JACK E. SEAMAN
Administrative Law Judge
611 Commerce St., Ste. 2704
Nashville, Tennessee 37203
(615) 255-0033
Prof. Resp. #4058

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been mailed, postage prepaid to John Edward Dowling, Jr., Counsel for Knox County, 612 City-County Building, Knoxville, Tennessee 37902 and E. Patrick Hull, Attorney at Law Post Office Box 1388, Kingsport, Tennessee 37662, Attorney for Parent, this 4th day of May, 1992.

s/ Jack E. Seaman

APPENDIX E -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 7, 1995

Case No: 94-5349

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

RAYMOND RYNES, by his parent and next friend, Deborah Rynes; DEBORAH RYNES, Individually,

Plaintiffs-Appellees

v.

KNOX COUNTY BOARD OF EDUCATION;

Defendant-Appellant

CHARLES E. SMITH, Tennessee Commissioner of Education; THE TENNESSEE DEPARTMENT OF EDUCATION,

Defendants

BEFORE: KRUPANSKY, MILBURN, BATCHELDER, Circuit Judges

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
SEP 29 1995
OFFICE OF THE CLERK

95-351

No.

In The

Supreme Court of the United States

October Term, 1995

KNOX COUNTY BOARD OF EDUCATION,

Petitioner,

vs.

RAYMOND RYNES, by his parent and next friend, DEBORAH RYNES and DEBORAH RYNES, Individually,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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Contents *Page*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases Cited:

Brown v. Griggsville Community Unit School Dist. No. 4, 12 F. 3d 681 (7th Cir. 1993) 5, 6, 7

Farrar v. Hobby, 506 U.S. _____, 113 S. Ct. 566, 121 L.Ed.2d 494 (1992) 4, 5, 6, 8

Krichinsky v. Knox County Schools, 963 F. 2d 847, 850 (6th Cir. 1992) 9

Statutes Cited:

20 U.S.C. § 1400, et seq. 3

Contents *Page*

20 U.S.C. § 1415(b)(2) 5, 8

20 U.S.C. § 1415(e) (2) 8

20 U.S.C. §1415(e)(4)(B) 3

42 U.S.C. § 1988 9

Other Authorities Cited:

34 C.F.R. § 300.343 7

34 C.F.R. § 300.344(a) 7

Sen. Rep. No. 99-372, 99th Cong., 1st Sess. 2 (1986) ... 10

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 20 U.S.C. § 1415(b)(2) (Procedural Safeguards)

(b) Required procedures; hearing

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

B. 20 U.S.C. § 1415(e)(2)

(e) Civil action; jurisdiction

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

C. 20 U.S.C. § 1415(e)(4)(B)(Civil action; jurisdiction; attorney fees):

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

D. 34 C.F.R. § 300.343 (Meetings)

(a) General
Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).
(b) [Reserved]
(c) Timeline
A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.
(d) Review
Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

E. 34 C.F.R. § 300.344(a) (Participants in meetings)
(a) General
The public agency shall ensure that each meeting includes the following participants:
(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.
(2) The child's teacher.

(3) One or both of the child's parents, subject to Sec. 300.345.
(4) The child, if appropriate.
(5) Other individuals at the discretion of the parent or agency.

STATEMENT OF THE CASE

Plaintiffs/respondents disagree with the Statement of the Case in the Petition and submit the following additional statement. (The terms "plaintiffs" and "defendant" will be used to refer to the parties).

The case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq. The original issue was whether Raymond Rynes, a deaf child, would attend Tennessee School for the Deaf (TSD) or a Knox County school. This issue was resolved in favor of the plaintiffs in an agreed order. District Court Memorandum and Order at Ptr. App. 5. The only issue remaining is whether the plaintiff/parent is the "prevailing party" within the meaning of 20 U.S.C. §1415(e)(4)(B).

The District Court found that litigation between the parties began in 1990 when the defendant decided to place Raymond in a school other than TSD. Prior to that time, the defendant had continuously placed Raymond at TSD. Plaintiffs requested a due process hearing. That proceeding was concluded by the entry of an agreed order which allowed Raymond to attend TSD. District Court Memorandum and Order at Ptr. App. 6.

In 1991, defendant again attempted to force Raymond to leave TSD. This resulted in a second due process hearing, in which the Judge ruled in favor of the defendant on the placement issue but ordered modifications of the program offered by the defendant. Final Order of the Tennessee State Department of Education at Ptr. App. 13.

Plaintiffs appealed to the United States District Court for the Eastern District of Tennessee. In the District Court, an agreed order was entered which provided that Raymond would continue his education at TSD. District Court Memorandum and Order at Ptr. App. 5. This was precisely the relief on the

merits which plaintiffs sought.

Defendant's decision to settle the case by allowing Raymond to attend TSD, came during a private discussion among members of its staff. Plaintiffs were not advised of the meeting and obviously did not attend.

The District Court held:

> "There is no doubt what the plaintiffs hoped to achieve by requesting a hearing and then appealing the findings of the ALJ was for continued placement at TSD for Raymond. This result has been achieved ...". District Court Memorandum and Order at Ptr. App. 9.

The District Court found the parent to be the "prevailing party" and awarded attorneys' fees. Judgment of the District Court at Ptr. App. 3.

Defendant appealed the attorneys' fee award. The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, from the bench, without a written opinion. Order of the United States Court of Appeals for the Sixth Circuit filed June 1, 1995, at Ptr. App. 1. The defendant filed a Petition for Re-Hearing and Suggestion for Re-Hearing *En Banc*, which was overruled. Order of the United States Court of Appeals for the Sixth Circuit filed July 7, 1995 at Ptr. App. 27.

SUMMARY OF ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CORRECT AND THIS CASE MEETS NONE OF THE CRITERIA ESTABLISHED BY THIS COURT FOR THE GRANTING OF A WRIT OF CERTIORARI.

This Court has recently issued a thorough, comprehensive opinion governing attorney fee litigation. *Farrar v. Hobby*, 506

U.S. _____, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992). The fact that the instant case has no importance as a precedent is emphasized by the fact that the Court of Appeals decided it without writing an opinion. The parent/plaintiff in this case clearly meets the criteria of *Farrar*, and no additional issues are present beyond those decided in *Farrar*.

Defendant purports to demonstrate a conflict between the instant case and *Brown v. Griggsville Community Unit School Dist. No. 4*, 12 F.3d 681 (7th Cir. 1993). This case is distinguishable from *Brown* on a number of grounds. In *Brown*, the case was resolved before a hearing, at a meeting of the child's IEP team, causing the parents to withdraw their request for a hearing. This case was resolved by entry of an agreed order in the District Court, after litigation in a due process hearing and in the District Court. Also, in this case, the settlement did not take place at a meeting of the child's IEP team. This case is also distinguishable from *Brown* upon other factual grounds.

The plaintiffs took the only option available to them to contest the defendant's proposed placement of the child. They followed the procedure set out in the Individuals with Disabilities Education Act. 20 U.S.C. Sec. 1415(b)(2). They achieved the relief they sought in the District Court.

The decisions of the District Court and the Court of Appeals are correct. Holding to the contrary would require the conclusion that a parent who contests a decision of school authorities, and goes through extended litigation, only to have the authorities simply change position during the litigation, would be denied attorneys fees. Such a decision would shift the tremendous cost of attorneys' fees and litigation to a victorious parent through no fault of the parent. Such a conclusion is contrary to established precedent, and common sense. It also would create a chilling effect upon parents who disagreed with decisions of school authorities. It would mean that poor parents who could not afford to pay attorneys' fees could not afford to exercise their rights under the Individuals with Disabilities Education Act.

ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CORRECT AND THIS CASE MEETS NONE OF THE CRITERIA ESTABLISHED BY THIS COURT FOR THE GRANTING OF A WRIT OF CERTIORARI.

This Court has recently issued a thorough, comprehensive opinion governing attorney fee litigation. *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992). Another opinion, so soon on the heels of *Farrar*, is unnecessary. The instant case has no precedential importance, nothing to add to *Farrar*, and no interest to anyone but the litigants. The case was of such little significance to the Court of Appeals that no opinion was written. None of this Court's criteria for granting certiorari are present. Additionally, this case would not be an appropriate one in which to answer issues which may have arisen in the wake of *Farrar*, since the plaintiff/parent in this case clearly meets the criteria set out in *Farrar*, and, therefore, no such issues exist.

Defendant's basis for requesting the writ is that it claims there is a conflict among the Courts of Appeals. The "conflict" for which Defendant searches simply does not exist. Defendant's attempts to demonstrate such a conflict between this case and *Brown v. Griggsville Community Unit School Dist. No. 4*, 12 F. 3d 681 (7th Cir 1993) fail upon closer examination. There are several major distinctions between the cases. In *Brown*, the plaintiffs achieved their goal simply by filing a due process request and waiting for over a year, during which time there was no contact between the parties. *Brown*, 12 F. 3d at 682. There was no decision or order by any Judge on the merits. In reality there was no litigation; in fact, the parents ***withdrew*** their request for a hearing shortly after a meeting of the child's IEP team was convened and an agreement was reached. *Id.* In this case, there has been extensive litigation and decisions at the administrative level, the District Court, the Court of Appeals, and the case is now before this Court.

A second distinction is that in ***Brown***, the decision that resolved the disagreement was made as provided by law at a meeting of the child's IEP team. In this case, the decision to settle the litigation did not take place in a meeting of the child's IEP team, but rather was a unilateral one made in a private discussion among members of the defendant's staff. The decision in this case was not made in a meeting required by the IDEA, and not by the IEP team as required by the IDEA. The IEP team meeting is required annually and the parents have a right to attend and be involved in the team's decision. 34 C.F.R. §300.343; 34 C.F.R. §300.344(a). Defendant's allegation that its decision to settle this case was made as part of a federally mandated meeting pursuant to 34 C.F.R. §300.343 is simply incorrect.

A third distinction between this case and ***Brown***, is that in ***Brown***, the progress of the student, which caused the parties to agree, was a matter of objective determination. ***Brown***, F.3d at 685. That is, in ***Brown***, the child's progress in school was measured by testing. It was therefore established that the child had made a measured amount of progress, and a certain placement was appropriate.

In this case, the alleged reason for the settlement of the case is subjective. There are no objective criteria which require placement at one school or another. The decision to allow the student to remain at TSD was, at best, an exercise of discretion by members of the defendant's staff. Plaintiffs dispute defendant's contention that the settlement of the case was due to a change in circumstances in mid-litigation. Plaintiffs contend that the same circumstances were evident from the beginning, and that the change of position was a legal maneuver intended to avoid payment of attorney's fees.

The instant case is also distinguishable from ***Brown*** in that, in ***Brown***, the school system made one reversal of position at an IEP meeting which rendered the case moot. In this case, the defendant has made a confusing series of position changes over a period of years. The defendant began by placing Raymond at TSD. In 1990, it changed its position, which led to the first

administrative hearing. In the midst of that proceeding, it changed its position and settled the case. In 1991 it changed its position again, triggering this case. In 1993 it changed its position again. The defendant has continually used the tactic of "changing position" as a legal maneuver.

Defendant sets out several other cases which have been decided before and after *Farrar*. These cases contain issues not present in the instant case, and have no bearing on the Court's consideration of the Petition.

This case was triggered when the defendant, over plaintiffs objection, proposed to change the placement of the student. At that time, plaintiffs had only two choices: (1) accept the defendant's decision; or (2) request a hearing. Plair.tiffs took the only option available to contest the decision. 20 U.S.C. §1415(b)(2).

When they were not satisfied with the due process decision, plaintiffs filed a complaint in the District Court. Again, this is what they were directed to do by Congress and the only choice available, other than to accept a decision with which they disagreed. 20 U.S.C. §1415(e)(2).

In the District Court, plaintiffs obtained the relief they sought. There is no suggestion that plaintiffs caused a delay or took inappropriate action. Plaintiffs suggest that it would be startling to any parent of a disabled child to find that she could follow proper procedure, achieve the result she sought, and not be the prevailing party.

Defendant's argument rests upon the notion that if a student's condition changes during litigation, in a way that favors the parent's position, the school system should be relieved of paying attorneys' fees, since, defendant argues, it is the change in the student, rather than the litigation which may tip the scales in favor of the parent. Defendant's notion, is of course, erroneous. These cases all deal with young children who are constantly changing. Some changes will favor the parent and some the school system. This is simply the natural course of litigation, not a reason to deny attorney's fees.

Defendant's statement that, "This unprecedented decision

represents such a departure from past Court practice and is so novel that this Court should exercise its power of supervision . . . ", Pet. at 23, is unwarranted. It is hard to imagine an easier case. Defendant's convoluted labyrinth of logic only attempts to complicate the obvious.

Defendant claims that, "... [a] judicial defining of the IDEA 'prevailing party' is needed . . .", Pet. at 13, and suggests that precedents under 42 U.S.C. §1988 have no applicability to IDEA cases. Defendant overlooks the holding of the Sixth Circuit Court of Appeals in a case in which this defendant was involved, *Krichinsky v. Knox County Schools*, 963 F. 2d 847 (6th Cir. 1992). The Court held that the legislative history of the Handicapped Children's Protection Act indicates that the term "prevailing party" is intended to have the same meaning as similar terms in other legislation. *Id.* at 849. Cases decided under 42 U.S.C. §1988, are applicable precedents to cases under the IDEA.

Defendant's theory compels the conclusion that it would have been impossible from the outset for the plaintiff/parent to have been the prevailing party. Defendant argues that it was the passage of time which caused it to "change its position". This compels the conclusion that plaintiffs' victory was inevitable, and therefore, defendant argues, the parent should not be considered the prevailing party. The flaw in defendant's theory is evident. Certainly Congress did not intend to pass an act providing for attorneys fees for parents who are the prevailing parties, in cases in which it would be impossible for the parents to be the prevailing parties. Defendant's argument that it alone has the right to decide, on a subjective basis, whether a child has changed sufficiently to justify the defendant's changing its position makes a mockery of the IDEA's fee shifting provisions.

Under the defendant's theory, a parent (like Ms. Rynes in this case) could expend thousands of dollars pursuing a winning case only to be left "holding the bag" after a school system change of mind. In fact, under the defendant's theory, parents with meritorious claims, whose positions would be most likely to be vindicated, would be the most likely to be denied attorneys fees.

The legislative history of the attorneys' fees provisions of the

IDEA is illuminating. The legislative history discloses that, "Congress' original intent was that due process procedures, including the right to litigation, . . . be available to all parents." Sen. Rep. No.99-372, 99th Cong., 1st Sess. 2 (1986). The defendant's proposed construction of the Act is contrary to this purpose.

Under defendant's theory, Ms. Rynes would suffer financially for exercising her rights. According to defendant, the only way this could have been avoided would have been for Ms. Rynes to have concluded at the outset that she could not afford to exercise her rights. If this Court were to adopt defendant's theory, poor parents would often have to conclude that they could not afford to exercise their rights under the IDEA. Such a chilling effect is directly contrary to the purposes of the Act.

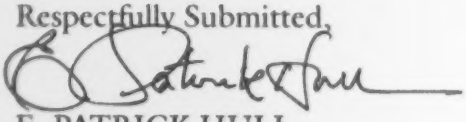
CONCLUSION

This case does not meet the criteria for the granting of a Writ of Certiorari. The reason defendant petitions this Court is that it disagrees with the decisions of the District Court and the Court of Appeals. The precedent which the defendant asks this Court to establish is contrary to common sense, prior cases and the letter and spirit of the Individuals with Disabilities Education Act. The petition should be denied.

Plaintiffs point out that since the District Court's award of fees and costs, they have been through an appeal to the Court of

Appeals for the Sixth Circuit and the preparation of this brief, and have incurred considerable additional expenses and fees. Plaintiffs ask that this Court remand this case to the appropriate Court for the awarding of additional fees and expenses.

Respectfully Submitted,



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